NATIONAL
INDIAN
GAMING
COMMISSION

JUN - 9 1995

Floyd E. Leonard, Chief
Miami Tribe of Oklahoma
P.O. Box 1326
Miami, Oklahoma 74355

Clark D. Stewart, President
Butler National Service Corporation
8405 Melrose Drive
Lenexa, Kansas 66214

Dear Chief Leonard and Mr. Stewart:

On April 4, 1995, the National Indian Gaming Commission (NIGC) affirmed the Chairman's disapproval of the management contract dated October 12, 1993, between the Miami Tribe of Oklahoma (Tribe) and Butler National Service Corporation (Butler), a Delaware corporation. This letter supplements that decision.

On May 12, 1994, the NIGC requested an opinion from the Associate Solicitor, Division of Indian Affairs of the Department of the Interior, as to whether a restricted Indian allotment in the State of Kansas, known as the Maria Christiana Miami Reserve No. 35, falls within the statutory definition of "Indian lands" for purposes of the Indian Gaming Regulatory Act (IGRA). Because of the expertise of the Solicitor's Office in Indian lands questions, the NIGC defers to their opinions.

On May 23, 1995, the Solicitor's Office provided the NIGC with an opinion (enclosed) stating that the Maria Christiana tract does not constitute "Indian lands" for purposes of IGRA because the Tribe does not exercise governmental power over the tract. As a result of this determination, the management contract is also disapproved because the proposed gaming site does not qualify as Indian lands.

If you have any questions regarding this supplemental decision, please feel free to contact our office at (202) 632-7003.

Sincerely yours,

Harold A. Monteau
Chairman

Jana McKeag
Commissioner

cc: Kip Kubin, Esq.
Payne & Jones
11000 King, Suite 200
P.O. Box 25625
Overland Park, KS 66225-5625

Enclosure

United States Department of the Interior

OFFICE OF THE SOLICITOR

In reply, please address to:
Main Interior, Room 6456

MAY 23 1995

Michael D. Cox, General Counsel
National Indian Gaming Commission
1850 M Street, NW, Suite 250
Washington, D.C. 20036

Dear Mr. Cox:

On May 12, 1994 your office requested an opinion as to whether a restricted Indian allotment in the State of Kansas known as the Maria Christiana Miami Reserve No. 35 falls within the statutory definition of "Indian lands" for purposes of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988).[1] In order to respond to your request, we must determine whether the Christiana allotment in Kansas is subject to the jurisdictional authority of the Tribe for purposes of gaming pursuant to IGRA. For the reasons set forth below, we conclude that the Christiana allotment does not constitute "Indian lands" for purposes of IGRA.

Historical Background of the Miami Tribe in Kansas and of the Christiana Allotment

By the Treaty of June 5, 1854, 10 Stat. 1093, the Miami Tribe agreed to cede to the United States most its remaining 500,000 acres of land in Kansas Territory, except 70,640 acres, which the Tribe reserved for its use. The United States agreed to pay the Tribe $200,000 in 20 annual installments of $7,500 with the remaining $50,000 to be invested for the Tribe. The Treaty recognized two groups of Miami Indians: the Western Miami, recognized as the political body of the Tribe; and the Indiana

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[1] IGRA allows Class II and III gaming on "Indian lands." IGRA defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
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> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)(1994 Supp.).

Miami, consisting of individual Miami Indians who remained in Indiana. Article 4 of the 1854 Treaty provided that no annuities or other interest would be payable, without the consent of the Miami of Indiana, to any person not listed on a corrected list of members agreed to by the Tribe and witnessed by Commissioner Manypenny. Treaty of June 5, 1854, 10 Stat. 1093. The corrected list contained the names of 302 individuals who were permitted to remain in Indiana when the Tribe moved west to Kansas Territory and who were to receive their proportionate individual shares of the annuities due the Tribe. See Id.

In 1857, several families, who were descended from Miami tribal members, including the Frederick DeRome family (the family of Maria Christiana DeRome) petitioned Congress to add their names to the annuity rolls of the Indiana Miamis since they had been excluded from the original list of 302 eligible to remain in Indiana and receive an annuity. The leaders of the Indiana Miamis opposed the inclusion of these individuals on the list of eligible recipients of the annuity payments. See H.R. Rep. No. 3852, 51st Cong., 2d Sess. (1891); H.R. Exec. Doc. No. 23, 49th Cong., 1st Sess. at 14 (1886). Congress directed the Secretary of the Interior to pay annuities to these individuals and to place their names on the annuity roll of the Indiana Miami. Act of June 12, 1858, 11 Stat. 332. Congress further directed the Secretary of the Interior to allot to each of these individuals 200 acres of land out of the 70,640 acres reserved to the Western Miamis by the Treaty of June 5, 1854. Id.

In accordance with the Act, in October of 1858, the Secretary of Interior paid to these individuals a total amount equal to the annuities that had not been paid them in the preceding years, totaling $18,370.89. The 68 names (5 more names were later added for a total of 73) were then added to the roll of those Indiana Miamis who were eligible to receive annuities.[2] See H.R. Misc. Doc. No. 83, 51st Cong., 2d Sess. (1891). Additionally, beginning in October of 1859, the Secretary of the Interior, as instructed, allotted to each of these 73 individuals 200 acres of land located in Kansas (total 14,533.38 acres) out of the 70,640 acres reserved to the Miami Tribe by the treaty of 1854. See H.R. Misc. Doc. No. 83, 51st Cong., 2d Sess. (1891).

The Maria Christiana tract was allotted from this reserved acreage in 1859. Although most of the Christiana allotment eventually passed out of the hands of the Indian heirs and therefore became

[2] See H.R. Exec. Doc. No. 23, 49th Cong., 1st Sess. at 14 (1886). Among these are individuals from families named Minnie, Bowers, Harris, La Croix, and DeRome. The DeRome family members included, among others, a father, Frederick, his non-Indian wife, and their infant daughter Maria Christiana DeRome to whom an allotment was given in Kansas.

unrestricted, there remains a 35 acre tract that has remained in restricted status administered by the BIA for the individual owners.[3]

The 73 individuals added to the list by the Secretary of Interior continued to draw annuities at the designated places in Indiana for a number of years from 1859 until 1867. On September 20, 1867, based on the protest of the Indiana Miamis, the Attorney General of the United States issued an opinion which held that the names of these 73 individuals were improperly added to the annuity roll of the Indiana Miamis. He reasoned that the addition of these names violated the express terms of the 1854 treaty which required the consent of the Indiana Miamis before any additions to the roll could be made. Accordingly, in 1867 these individuals were dropped from the list of those entitled to receive a share of the annuities. See 12 Op. Atty. Gen. 236 (1867); S. Misc. Doc. No. 131, 53rd Cong., 3d Sess. (1895).

After these individuals were dropped from the annuity roll of the Indiana Miami, Congress further instructed the Secretary of the Interior to include these individuals on the rolls of the Miami Indians in Kansas if he found them entitled to be included. See Act of March 3, 1873, 17 Stat. 631. However, the Secretary of Interior found that the 73 individuals were not eligible to be included on the roll of the Western Miamis because they did not emigrate with the Tribe but remained in Indiana. See H.R. Rep. No. 3852, 51st Cong., 2d Sess. (1891).

The Miami Tribe of Oklahoma

In the Treaty of February 23, 1867, 15 Stat. 513, the Miami Tribe was encouraged to move from Kansas to a reservation established at the Quapaw Agency where they would confederate with several other tribes. The Miami Indians who remained in Kansas were to become United States citizens and surrender tribal membership if they fulfilled certain conditions. Act of March 3, 1873, 17 Stat. 631. Seventy-two tribal members elected to remove to Oklahoma, while those who remained in Kansas severed their tribal relations.

The Western Miamis ceded their remaining land in Kansas and Congress directed the Secretary of Interior to determine which

[3] The United States, through the Bureau of Indian Affairs, has continued to probate this property. In an action to obtain title by adverse possession, the District Court of Kansas partitioned the Maria Christiana allotment and granted clear title to 45 Acres of the allotment to Midwest Investment Properties, Inc. See Midwest Investment Properties, Inc. v. Derome, No. 86-2497-0 (D. Kan., May 3, 1989). The Secretary of Interior is authorized to probate allotted Indian lands when the owner dies intestate. See 25 U.S.C. § 372.

individuals were entitled to share in the resulting funds, including:

> [T]hose persons of Miami blood or descent for whom provision was made by the third section of the act of June twelfth, eighteen hundred and fifty-eight, if in the opinion of the Secretary of the Interior the said Indians are entitled to be so included under treaty stipulations.

17 Stat. 631, 632. By letter dated February 11, 1873, the Secretary of the Interior forwarded to Congress a report from the Superintendent of Indian affairs which determined that none of the individuals who had received an allotment pursuant to the June 12, 1858 Act were entitled to share in the proceeds from the sale of the Tribe's land in Kansas. The Commissioner opined that these individuals of Miami blood had not been "recognized as Miamis, either by the tribe in Kansas or by those residing in Indiana, who . . . have never joined the tribe in Kansas, and until now have claimed no benefits from their annuities." See H.R. Exec. Doc. No. 199, 42nd Cong., 3d Sess. (1873). Maria Christiana DeRome had been included in this group and had received her allotment despite the lack of tribal membership in either group.

In addition to refusing to recognize these individuals as members of the Tribe or to share in the proceeds from the sale of lands in Kansas, in 1891 the Western Miamis sued in the United States Court of Claims, seeking reimbursement for their share of erroneous annuity payments made to the 73 individuals. The Tribe also sought reimbursement for the value of land erroneously allotted to these individuals in Kansas Territory, amounting to approximately 14,000 acres. The Court of Claims held that the Western Miamis were entitled to recover the amount of money erroneously paid as back annuities for the 73, as well as the value of the land allotted to these individuals. See The Western Miami Indians v. United States, Ct. Claims No. 1349, Jan. 9, 1891 in H.R. Misc. Doc. No. 83, 51st Cong., 2d Sess. (1891). In 1891 Congress appropriated $18,370.89 to the Western Miamis to reimburse them for the annuities paid to those not entitled to them. Congress further directed the Secretary of the Treasury to pay the Western Miami Indians $43,600.14 for 14,533 acres of land which were taken and allotted to persons not entitled to the lands. See 26 Stat. 1000.

In summary, the Christiana allotment was provided to a non-member of the Miami tribe, whose descendants were likewise not afforded tribal membership. It is located in western Kansas in an area ceded by the Tribe to the United States when the Tribe removed to Indian territory, i.e., present day Oklahoma. The Miami Tribe is now located approximately 180 miles from the Christiana allotment.

Tribal Jurisdiction under IGRA

Gaming activities on Indian lands are regulated pursuant to the

Indian Gaming Regulatory Act. "Indian lands" are not limited to those located within the boundaries of an Indian reservation. Congress also included trust lands and lands held by any Indian tribe or individual subject to restriction by the United States against alienation, provided, that an Indian tribe "exercises governmental power" over the land. IGRA does not define the circumstances under which a tribe "exercises governmental power" over restricted land. The legislative history of the Act provides no guidance on this issue.

Tribal jurisdiction is generally limited to "Indian country,"[4] but in enacting IGRA, Congress limited gaming to "Indian lands," which is not synonymous with "Indian country." Congress has used the definition of "Indian country" in numerous statutes. See e.g. 16 U.S.C. §§ 3371(c), 3377(c); 25 U.S.C. § 450h (a)(3); 25 U.S.C. § 1322 (a); 25 U.S.C. § 1903 (10); 25 U.S.C. § 3202 (8). IGRA's use of the phrase "Indian lands" rather than "Indian country" indicates that IGRA's jurisdictional reach is not identical to statutes which refer to "Indian Country."[5]

Indian tribes are possessed of sovereignty over "their members and

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[4] In 1948, Congress defined "Indian country" as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

[5] In 15 U.S.C. § 1175, 64. Stat. 1135, Congress enacted legislation which specifically prohibited gambling devices in Indian country. Congress based the jurisdictional reach of this law on the Indian country definition contained at 18 U.S.C. § 1151. It is therefore evident that had Congress intended IGRA to apply to Indian-owned allotments without regard to the exercise of governmental authority, it could have similarly adopted the Section 1151 definition of Indian country for the IGRA.

their territory." Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981). There is a presumption in favor of tribal jurisdiction over all land within reservations and over dependent Indian communities. See Indian Country, U.S.A., Inc. v. Oklahoma 829 F.2d 967 (10th Cir. 1987), cert. denied, sub nom., Oklahoma Tax Com. v. Muscogee (Creek) Nation, 487 U.S. 1218, 101 L. Ed. 2d 906, 108 S. Ct. 2870 (1988); see also De Coteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987); Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie, 856 F.2d 1384, 1390 (9th Cir. 1988). See generally F. Cohen, Handbook of Federal Indian Law at 229-59 (1982 ed.).

The presumption of governmental power over off-reservation Indian country is doubtful when the land in question is not owned or occupied by tribal members and is far removed from the tribal community. Cf. e.g. Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indians, 498 U.S. 505, 511 (1991)(usual tax immunities apply to tribal trust land within original reservation boundaries); Oklahoma Tax Com'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1991 (1993). Indeed, in each of the foregoing cases the Supreme Court applied the usual rules preempting state jurisdiction over tribal activities on trust lands. Assertion of tribal jurisdiction over individual restricted lots, such as the Christiana allotment, on the other hand, is problematic when there is no longer a tribal nexus to the lands or a political relationship with the owners of the lands. See, F. Cohen, Handbook of Federal Indian Law at 346-48 (1982 ed.)(basis for tribal jurisdiction over allotments outside of reservations is tribal membership, or that allotments are clustered and thus part of a dependent Indian community); and see also, Wilkinson, American Indians, Time, and the Law at 87-93 (1987). Congress did not simply call for a determination of whether then land in question is Indian country, it required a determination that such land is subject to a given tribe's governmental power.

The Tribe's Claim of Governmental Power Over the Christiana Allotment

The Tribe contends that since its original jurisdiction over the allotted lands has never been altered or diminished by the United States, it still retains its authority over the land and hence authority under IGRA. However, by the Act of March 7, 1873, the Miami Tribe ceded its remaining lands in Kansas to the United States. The Tribe agreed to sell all its unallotted and unoccupied land in Kansas and that all Miamis who wanted to maintain tribal relations with the Tribe would remove to Indian country (present-day Oklahoma). Thirty-three (33) Miamis agreed to remain in Kansas on their allotted lands and took all necessary steps to become U.S. citizens and henceforth their tribal relations were abolished. 17 Stat. 631. 632; see H. R. Rep. No. 22, 47th Cong., 1st Sess.

(1882)(the 33 Miamis who stayed in Kansas have done all that was required under the treaty to become citizens). The owners of the Christiana allotment likewise were not members of the Tribe.

The Miami Tribe of Oklahoma no longer retains the exclusive use and benefit of the Christiana allotment since the land was allotted to individuals who were not members of the Tribe and because they severed the tribal relationship.[6] The allotment subsequently passed, through inheritance, to the heirs of the original allottee, also nonmembers of the Tribe. Although the Tribe initially had broad power to exclude others from the tribal land-base from which the Christiana allotment was carved, this power was diminished when the land was allotted to Maria Christiana and her heirs and severed when the Tribe voluntarily surrendered its authority over the land and moved to Oklahoma. See Treaty with the Seneca, Mixed Seneca and Shawnee, Etc., 15 Stat. 513; and Act of March 3, 1873, 17 Stat. 631. We note that while the Maria Christiana allotment has been considered Indian country for some purposes because of its history as an Indian allotment, there is no indication that the allotment is part of a dependent Indian community, or that the Tribe has exercised jurisdiction over its members on the allotment. See 25 U.S.C. § 1151; United States v. Sandoval, 231 U.S. 28, 47-48, 34 S. Ct. 1, 6-7, 58 L.Ed. 107 (1913); State of Alaska v Native Village of Venetie, 856 F.2d 1384, 1390-91 (9th Cir. 1988); United States v. Azure, 801 F.2d 336, 338-39 (8th Cir.1986).[7]

On its tribal land base in Oklahoma, the Miami Tribe exercises governmental authority in the areas of housing and welfare, descent and distribution, cultural development and some education programs. Miami Tribe of Oklahoma Resolution No. 95-18, December 6, 1994;

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[6] The ancestors of the current Christiana landowners severed their tribal relations, as reflected by their exclusion from the rolls of Indiana Miamis and from the rolls of the Western Miamis. We note that the names of these individuals are listed on the January 1, 1859 annuity roll of the Miami Indians but not on the later 1891 roll taken in Oklahoma. See Annuity Pay roll for Western Miami Tribe of Indians, June 12, 1891.

[7] Although BIA superintendence over the allotment has been continuous, federal supervision in this case does not indicate that the land-owners are recognized as members of an Indian tribe. It merely evidences the continued restricted status of the land because the restrictions are not personal but run with the land to successors. See 25 U.S.C. § 372; Bowling & Miami Inv. Co. v. United States, 233 U.S. 528, 58 L. Ed. 1080, 34 S. Ct. 659 (1914). Because the land-owners are not members of a federally recognized tribe, the BIA has administered the land because of its restricted status, not based on the tribal status of the land-owners.

Miami Tribe of Oklahoma Resolution No. 95-13. There is no evidence that the Tribe exercises any of these powers over the distant Maria Christiana allotment. Although the Tribe's actions in writing a letter to halt further trespassing on the Christiana allotment and constructing a fence on the property indicate that the Tribe purports to possess some authority over the Christiana allotment, there is no indication that the Tribe exercises civil regulatory governmental powers over the Christiana allotment, such as those exercised over its tribal land base in Oklahoma.[8] Thus, given the absence of tribal ownership or inhabitation by tribal members of the Christiana allotment, the Miami Tribe's governmental authority over its "members and . . . territory" in Kansas is nonexistent.

In our opinion, the jurisdiction of the Miami Tribe of Oklahoma over the Maria Christiana Miami Reserve No. 35 is not established. This is evidenced by the events and decisions which required the United States to compensate the Tribe for the land improperly allotted to these individuals, the Tribe's refusal to allow the owners of the Christiana allotment to share in the proceeds from the sale of the tribal property in Kansas and the distance of the Christiana allotment from tribal headquarters in Oklahoma.

Conclusion

Because the Christiana allotment is: 1) not owned by the Tribe or tribal members; 2) not part of a dependent Indian community; and 3) distant (180 miles) from the location of the tribal community in Oklahoma, we conclude that the Miami Tribe of Oklahoma does not exercise governmental powers over it. It is thus not Indian land as defined by IGRA.

If you have any further questions in this regard, please contact Troy Woodward at (202) 208-6526.

Sincerely,

Robert T. Anderson
Associate Solicitor
Division of Indian Affairs

[8] At least one federal court of appeals has noted that lands need not necessarily be located within a tribe's reservation to constitute "Indian lands" for purposes of IGRA. Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) (the lands in question were Indian trust lands located outside the boundaries of the Tribe's reservation). The court did not, however, reach the question of whether the lands were "Indian lands" as defined by IGRA, since there were material disputed facts before the district court.